No. 86-872

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANKLIN W. ALLEN, **PETITIONER**

vs.

SPARTANBURG COUNTY DEPARTMENT OF SOCIAL SERVICES AND JEAN H. ALLEN, **RESPONDENTS**

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent refers to the Petition for the questions presented.

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CITATION TO OPINIONS BELOW

The Order of the Spartanburg County Family Court is unreported and is reproduced in Petitioner's Appendix C at page 97; however, on page 103 Petitioner omitted a portion of the findings of fact made in the original order. For that reason, we have reproduced their page 103 in our Appendix A, inserting the omitted material. The per

curiam order of the South Carolina Supreme Court affirming the lower court is unreported and is reproduced in the Petition beginning on page 21. The denial of Petitioner's motion for a rehearing is also unreported. The order is reproduced on page 24 of the Petition.

JURISDICTION

The denial of Petitioner's motion for a rehearing was entered by the South Carolina Supreme Court on July 23, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Petitioner alleges that this case involves the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. The case also involves analysis of §20-7-110 of the Code of Laws of South Carolina (1976), as amended, and Family Court Rule 13. These provisions are set out in

their entirety in Appendix B.

3. According to Petitioner, the case also involves §§15-5-310, 15-5-330, and 15-5-350 of the Code of Laws of South Carolina (1976). However, §15-5-350 covers cases in which a child resides out of state. §15-5-340 is probably the provision intended. These sections are set out in Appendix C.

4. Petitioner argues that §20-7-736 of the Code of Laws of South Carolina (1976), as amended, was unconstitutionally applied. This section is set out in Appendix D. South Carolina Family Court Rule 29 is also reproduced in Appendix D.

5. §20-7-690 (B)(1) of the South Carolina Code is challenged also. It is set out in Appendix E.

6. South Carolina Family Court Rule 26 governs the burden of proof in such cases. It is set out in Appendix F.

7. South Carolina Code §20-7-755 is also involved. The relevant portion of this

section reads:

> All cases of children shall be dealt with as separate hearings by the court without a jury... The general public shall be excluded and only such persons admitted as the judge shall find to have a direct interest in the case or in the work of the court...

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Amanda Jean Allen is the minor daughter of Franklin W. Allen and Jean H. Allen. The parents were divorced on January 24, 1983. Mr. Allen was given custody of his child on September 28, 1984.

The first report of sexual abuse of this child by Mr. Allen was in May 1984. The child told a school teacher her father had put his hand in her genital area. The Department of Social Services (DSS) investigated the report. During the investigation, Mr. Allen brought Amanda to DSS and both were interviewed. (Trial Tr. pp. 65-66). Ultimately, DSS decided that

sexual abuse had probably not occurred since the contact occurred when Mr. Allen was applying medication to the child. (Trial Tr. pp 64-65, 112, 115-116).

On November 2, 1984, during visitation with her mother, the child reported that she had been hurt by her father and had pain urinating. Mrs. Allen and her parents took Amanda to an emergency medical clinic where she was examined by a physician. Dr. McElhaney found a bruise on the mons pubis, puffiness of the upper labia with mild irritation and redness of the outer labia border. He also found that the vaginal opening was approximately one centimeter wide. The child verified to this doctor that her father had "hurt her bottom". (Trial Tr. pp. 8-28). Amanda was also seen by a second physician at a hospital emergency room. Dr. Kraeber, who was Mr. Allen's witness, did not see an opening in the hymen, but he did observe the bruise and redness of the labia.

(Trial Tr. pp 77-83). Both physicians confirmed that no infection or disease was present.

The first doctor reported the case to the Spartanburg City Police who called DSS. Both agencies began their investigations on November 2, 1986. A caseworker from DSS interviewed the child and she stated that her father had sexually abused her. During several interviews, she told a consistent, detailed story about the incident. She never retracted her story. During the course of her investigation, the caseworker identified numerous social and behavioral indicators considered to be consistent with intra-family sexual abuse. DSS's caseworker was aware of the divorce and the custody battle between the parents, but based on her investigation she concluded that the child had not been coerced or coached to make the statements she had made against her father. (Trial Tr. pp. 42-76).

On November 4, 1984, when she was scheduled to return to her father's home, Amanda was taken into emergency protective custody by the city police. She was placed in a DSS licensed group home for children. DSS filed a petition asking for custody on November 5, 1984. On November 13, 1984, this emergency action was reviewed and approved by the family court. (Petitioner's Appendix B). Custody was continued in DSS until such time as a hearing on the merits might be held. Regular, supervised visitation was allowed to Mr. Allen.

A videotaped interview of the child was conducted jointly by the police and DSS. Mr. Allen's attorney was present in a booth with monitors to observe the interview. (Trial Tr. pp. 75-76).

The merits hearing was twice continued, once on motion of Mr. Allen's attorney, and once by consent of the parties. On January 17, 1985, a hearing on the merits was

conducted before the Honorable David Wilburn, Jr. DSS presented testimony from two caseworkers, a police officer, Dr. McElhaney, and a psychologist. Mr. Allen entered a general denial through his attorney (Trial Tr. pp. 118-119) presented two witnesses, and the two court orders set out in Petitioner's Appendix A as his defense to the action. The family court judge interviewed the minor child in the presence of the attorneys without objection. She related that her father had undressed her, put his hand in her genital area and hurt her. This interview was on the record. (Trial Tr. pp. 108-117). Judge Wilburn concluded that the abuse had been proven by the required preponderance of evidence. Custody was awarded to DSS. A plan for placement with Mrs. Allen, supervision by DSS, visitation for Mr. Allen and counseling for all three was approved.

Mr. Allen appealed the matter to the

South Carolina Supreme Court. The family court's order was affirmed on June 30, 1986. The petition for rehearing was denied on July 23, 1986.

ARGUMENT

Respondent will address each of the questions presented by Petitioner in order with separate arguments.

I

The writ of certiorari should not be granted to review the first question presented by Petitioner for two reasons. First of all, Petitioner offered no objection in the trial court to the procedure used to appoint the child's guardian ad litem. He entered an objection to the individual selected, alleging prejudice, and proposed substitution of another guardian or appointment of a co-guardian. The trial judge concluded that no legal prejudice existed. (Trial Tr. pp. 3-5). The procedure used to appoint the guardian was not

questioned and the family court judge was given no opportunity to consider the propriety of the procedure used. For that reason, the South Carolina Supreme Court refused to consider the question when it was raised on appeal.

In Powers v. City of Aiken, 255 S.C. 115, 177 S.E.2d 370(1970), the South Carolina Supreme Court set out its rationale for requiring an issue to be decided first at the trial level:

> This is a court of review. The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him. For the guidance of the bar we restate the holding made by this court in many cases heretofore: This court will not grant relief on alleged error asserted for the first time on appeal.
>
> 177 S.E.2d at 371

The Federal question was not considered or decided in either the trial court or the

South Carolina Supreme Court. The United States Supreme Court has no jurisdiction under 28 U.S.C. §1257 to consider the constitutionality of the procedure used to appoint the guardian ad litem.

The second reason this question should not be decided by this Court is that it involves interpretation of state court rules and state statutes. South Carolina Code §§15-5-310, 15-5-330, and 15-5-340 all govern appointment of a guardian ad litem in the usual civil case. South Carolina Code §20-7-110 is a separate provision, not requiring notice to a child's legal guardian or parent. Family Court Rule 13 allows a family court judge to appoint a guardian ad litem for a child on petition of either party or the judge's own motion. Again there is no mention of notice. The proper construction of these provisions is a state law question that should be decided first by the state courts. Because it was never properly raised

in this case, it was never decided, by either the family court or the South Carolina Supreme Court. The United States Supreme Court should not grant certiorari to consider such an issue.

II

Certiorari should not be granted to review the second question raised by Petitioner because Mr. Allen did not object to the timing of the hearing in the trial court. He also failed to raise this challenge to the statute in the South Carolina Supreme Court. Since the question was never raised, the state courts have had no opportunity to decide the constitutionality of South Carolina Code §20-7-736 or its application in this case. The United States Supreme Court lacks jurisdiction to consider this question. Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969).

The statute itself provides that a

Respondent may obtain a continuance. Family Court Rule 29 also allows continuances. In fact, this case was continued twice, once on motion of Mr. Allen's attorney and once by consent of the parties; the merits hearing was actually held after the thirty days had run. Mr. Allen could have moved before the trial judge for an order continuing the merits hearing until the criminal matter was concluded, but he did not. Instead, he made a strategic decision to proceed, entering a general denial, putting up his witnesses and submitting into evidence the Allen v. Allen court orders.

Petitioner is trving now to create a constitutional issue the existence of which is not supported by the facts below and which was never considered below. The Petition for certiorari should be denied.

III

Petitioner challenges the constitutionality of South Carolina Code

§20-7-690 (B)(1) of the Code of Laws of South Carolina (1976), as amended. No challenge to the constitutionality of this statute was made in the trial court or the South Carolina Supreme Court. Neither state court has had the opportunity to decide this issue. Therefore, the United States Supreme Court lacks jurisdiction to consider the question on writ of certiorari since the validity of the state statute was not previously "drawn in question" as required by 28 U.S.C. §1257(3).

IV

The Petitioner asserts that the presence of a criminal investigator at the merits hearing violated his right against self incrimination. At trial, Petitioner objected to the presence of the investigator. However, he merely raised a question of the confidentiality of the family court proceedings. His attorney stated he would rather have the investigator wait until the

preliminary hearing in the criminal matter to hear testimony about the abuse. Mr. Allen's attorney conceded on the record that the investigator could get transcripts and expressed no objection to that. (Trial Tr. pp. 6-8). He failed to raise any constitutional objection to the presence of the investigator. He failed to indicate that it would have any effect on his client's decision to testify or not. Therefore, the trial judge did not rule on the federal question Mr. Allen raises in his Petition for writ of certiorari.

Mr. Allen asserted in his argument in the South Carolina Supreme Court that the presence of the investigator precluded him from presenting his case. However, the South Carolina appellate court affirmed the trial court on the basis of state law alone and it did not need to reach the Federal question. The state law relied upon was §20-7-755 of the Code of Laws of South

Carolina (1976), as amended.

The statute provides in part:

> All cases of children shall be dealt with as separate hearings by the court without a jury... The general public shall be excluded and only such persons admitted as the judge shall find to have a direct interest in the case or in the work of the court...

Since the decisions of the South Carolina courts rested on an adequate state ground and no Federal question was decided, the United States Supreme Court does not have jurisdiction to review this question. Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L. Ed. 789 (1945).

Ultimately, the question of the presence of the investigator raises some of the same considerations discussed above in the context of the timing of the hearing. Mr. Allen could have asked for continuance of this case until after the criminal proceedings had concluded. Then, the investigator would have had no interest in the DSS case. Mr. Allen

was not compelled to proceed with the investigator present. He simply elected to go forward as a matter of trial strategy.

V

Petitioner's final question would require the United States Supreme Court to undertake a review of the facts of this case already considered twice by South Carolina courts. The trial court found by a preponderance of evidence that Mr. Allen had sexually abused his daughter. The South Carolina Supreme Court affirmed that finding. A comparison of Petitioner's statement of the case with Respondent's and with the family court order reveals that he has presented some of the testimony and proceedings below erroneously. It seems clear that he desires this Court to compare his interpretation of the facts with those found to be true in the lower court and issue a decision somehow exonerating him. This Court should not grant certiorari to review findings of fact. While

the questions of fact in this case are important to the individual litigants, they do not rise to the level of importance that would justify review. United States Supreme Court Rule 17.

CONCLUSION

The child protection laws in South Carolina have been carefully structured to protect the rights of parents while ensuring the safety of the child. Mr. Allen was afforded a timely hearing to review the emergency removal of his child, followed by a full hearing on the merits of DSS's custody petition. He was never denied due process of law. The trial court decided the facts correctly; the South Carolina Supreme Court affirmed its decision, and refused to grant a rehearing. The Petitioner has failed to raise any substantial Federal questions to

merit the granting of the writ of certiorari.

The Petition should be denied.

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the child was examined by Dr. Austin McElhaney. The child told him that her father had "hurt her bottom," and had put his fingers there. Subsequently, she was transported to Spartanburg General Hospital's Emergency Room where Dr. D. M. Kraebber examined her. Both Doctors provided corroborative evidence in their testimony and I find that there was a bruise on the right side of the mons pubis, approximately the size of a man's fingertip or thumb, and that there was redness and irritation in the area of the inner labia. The redness and irritation were identified as not being related to disease or infection. Dr. McElhaney testified that the characteristics of the bruise and the irritation would be consistent with the genital area's having been manipulated.

§20-7-110. Legal representation.

In all child abuse and neglect proceedings:

(A) Children shall be appointed legal counsel and a guardian ad litem by the Family Court. Counsel for the child shall in no case be the same as counsel for the parent, guardian or other person subject to the proceeding or any governmental or social agency involved in the proceeding.

(B) Parents, guardians or other persons subject to any judicial proceeding shall be entitled to legal counsel. Those persons unable to afford legal representation shall be appointed counsel by the Family Court.

(C) The interests of the State and the local child protective services agency shall be represented by the circuit solicitor or his representative in the appropriate judicial circuit in any judicial proceeding.

RULE 13. GUARDIAN AD LITEM

In any matter relating to children, the Court shall upon petition of either party or its own motion appoint a guardian ad litem for said children when deemed to be in the best interest and welfare of the children.

§15-5-310. Actions by and against infants and incompetents.

When an infant is a party he must appear by guardian ad litem, who may be appointed by the court in which the action is prosecuted, a judge of probate, a clerk of court, or a master in those counties where the office of master exists. A mentally incompetent person, whether hospitalized or not, shall appear by guardian ad litem in an action by or against him. When an infant or mentally incompetent person is a party in a proceeding before the Industrial Commission of this State a guardian ad litem for such infant or mentally incompetent person may be appointed by a judge of probate, clerk of court or master, if there be a master, of the court wherein such infant or mentally incompetent person resides or by any circuit judge in this State.

§15-5-330. Appointment of guardian ad litem; infant plaintiff.

When an infant is plaintiff the guardian ad litem shall be appointed upon the application of the infant if he be of the age of fourteen years; if under that age, upon the application of his general or testamentary guardian, if he has any, or of relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

§15-5-340. Appointment of guardian ad litem; infant defendant.

When the infant is defendant the guardian ad litem shall be appointed upon the application of the infant, if he be of the age of fourteen years and apply within twenty days after the service of the summons. If he be under the age of fourteen or neglect so to apply, then the guardian ad litem shall be

appointed upon application of any other party to the action or of a relative or friend of the infant, after notice of such application shall have been given to the general or testamentary guardian of such infant, if he has one within this State or if he has none, then to the infant himself, if over fourteen years of age and within the State or, if under that age and within the State, to the person with whom such infant resides.

§20-7-736. Jurisdiction of family court under article; removal proceedings; procedures.

(A) The Family Court shall have exclusive jurisdiction over all proceedings held pursuant to this article.

(B) Upon investigation of a report received under §20-7-650 or at any time during the delivery of services by the agency, the local child protective services agency may petition the Family Court in its jurisdiction to remove the child from custody of the parent or guardian when the agency has probable cause to believe removal is necessary to protect the child's health or welfare.

(C) The petition shall contain a full description of the reasons why the child cannot be protected adequately in the custody of the parent or guardian, including a

description of the condition of the child, any previous efforts to work with the parent or guardian, in-home treatment programs which have been offered and proven inadequate and the attitude of the parent or guardian towards placement of the child in an alternative setting. The petition shall also contain a statement of the harms the child is likely to suffer as a result of removal and a description of the steps that will be taken to minimize the harm to the child that may result upon removal.

(D) Upon receipt of a removal petition under this section, the Family Court shall schedule a hearing to be held within thirty days of the date of receipt to determine whether removal is necessary.

The Family Court shall notify the parent or guardian of the hearing by delivering a copy of the petition, together with a notice of the hearing, which shall include the date and time of the hearing and an explanation of

the right of the parent or guardian to an attorney under §20-7-110. The Family Court shall effect delivery at least twenty-four hours prior to the hearing. The respondent shall be allowed to seek leave of court for a continuance of not less than forty-eight hours.

(E) A child shall not be removed from the custody of the parent or guardian unless the court finds that:

(1) The child has been physically injured as defined in §20-7-490 and there is a preponderance of the evidence that the child cannot be protected from further physical injury without being removed.

(2) The child has been endangered as otherwise defined in §20-7-490 and there is clear and convincing evidence that

the child cannot be protected from further harm of the type justifying intervention without being removed.

(3) There is an alternative placement available but in no case shall the placement be a facility for detention of criminal or juvenile offenders.

(F) The petition for removal may include a petition for termination of parental rights under the jurisdiction conferred on the Family Court by the Family Court Act.

RULE 29. CONTINUANCES

The Court may for good cause grant requests by any party for continuances prior to or during a hearing or may so continue said hearing upon the Court's own motion.

§20-7-690. Confidentiality of reports and records; penalties.

(A) All reports made pursuant to this article maintained by the State Department of Social Services, local child protective service agencies and the Central Registry of Child Abuse and Neglect shall be confidential. Any person who disseminates or permits the unathorized dissemination of such information shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

(B) Information contained in reports described in subsection (A) must not be made available to any individual or institution except:

(1) Appropriate staff of the State Department of Social Services,

local child protective services agencies, the ombudsman of the office of the Governor, any person or agency having legal responsibility or authorization to care for, treat, or supervise the child or the child's family, multidisciplinary evaluation teams empaneled by the agencies, and law enforcement agencies investigationg suspected cases of abuse and neglect....

RULE 26. BURDEN OF PROOF STANDARD

The material averments of fact as set forth in the petition or any affirmative defense shall be established by a preponderance of the evidence.